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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

JUN 17 PAGE 9

DANNY R. BEARDEN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment permit the probation of an indigent defendant to be revoked for failure to pay as directed when completion of his probation under the Georgia First Offenders Act would result, in effect, in his acquittal?

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STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

In the September, 1980 term of the Catoosa County, Georgia, Superior Court, petitioner, Danny R. Bearden, was indicted for theft by receiving stolen property and burglary. It was alleged that the offenses occurred on July 11, 1980 and July 7, 1980, respectively. (Appendix to Petition [hereafter App.] 51, 55). Petitioner pled guilty to both charges and was sentenced on October 8, 1980, under the Georgia First Offenders Act, Ga. Code §§ 27-2727, 2728, to serve one year on probation for the theft by receiving charge and three years on probation for the burglary offense, concurrently. The trial court also sentenced petitioner to pay $200.00 in restitution in the theft by receiving case within four months of October 8, 1980. In the burglary case, appellant was ordered to pay a $500.00 fine and $50.00 in restitution--$100.00 immediately, $100.00 by the next day (October 9, 1980), and the remaining $350.00 within four months of October 8, 1980. The fine and restitution payments were made conditions of probation. (App. 48-53). On May 27, 1981, the State of Georgia petitioned the trial court to revoke petitioner's probation. In the petition, the State claimed that petitioner had failed to pay the "fine and restitution balance of $550.00, which was to be paid on or before February 2, 1981" and that he had committed a burglary on May 10, 1981. (App. 2). A hearing was held on the State's petition on June 3, 1981, in the Catoosa County Superior Court. Petitioner, his wife, and probation officer testified. After the hearing, the trial court found that petitioner had failed to pay and report to his probation officer as directed, revoked his probation, and sentenced him to serve five years

on the burglary charge and three years for the theft by receiving offense, concurrently. But, his sentence was modified by the trial court on September 17, 1981, so as to require him to serve only the remainder of his original probated sentences entered on October 8, 1980. (App. 61-64). The Georgia Court of Appeals upheld the trial court's revocation solely on the trial court's finding that petitioner had failed to pay as directed. (App. 65-68). The Court of Appeals denied a motion for rehearing and on April 8, 1982, the Georgia Supreme Court denied a petition for its writ of certiorari. (App. 69-70).

B. STATEMENT OF FACTS

Petitioner failed to pay as directed by the probation order. With money borrowed from his parents, petitioner paid the $100.00 he was ordered to pay on October 8, 1980 and the $100.00 he was required to pay by October 9, 1980. (App. 14-16, 19, 25). He failed, however, to pay the $550.00 balance during the period allowed by the trial court. (App. 14-16, 18-19, 23-24).

Petitioner offered evidence to the effect that he lacked the financial resources to pay the $550.00 balance. He and his wife testified that he had no job, income, or assets. (App. 22, 27-29). He had not worked since November, 1980, when he was laid off from a Rockwell International plant. (App. 22, 35).

It should be noted that petitioner specifically consented to the probation order. Both petitioner and his trial counsel consented in writing to the order directing payment of the fine and restitutuion. (App. 53, 57, 33).

SUMMARY OF ARGUMENT

The rationality test of equal protection analysis applies to the question presented here. The revocation of petitioner's probation is rationally related to the State of Georgia's legitimate interest in administering probation in a just and socially useful manner, and in admitting to probation only those not likely to continue in criminal conduct. Employment and the related attribute of financial ability are certainly important considerations in assessing the likelihood of continued criminal activity.

ARGUMENT

Petitioner contends that the revocation of his probation violates the Equal Protection Clause of the Fourteenth Amendment.

A. THE PROPER STANDARD OF EQUAL PROTECTION REVIEW

The Equal Protection Clause has been held to require varying levels of scrutiny depending on the classification created by the state action in question. The highest level is called "strict scrutiny" and is invoked whenever a suspect criterion is the basis of the state classification. For example, the Court has held race, Loving v. Virginia, 388 U.S. 1, 9 (1967), and alienage, In Re Griffiths, 413 U.S. 717 (1973), to be suspect criteria. Some cases seem to support the existence of a middle level of scrutiny which requires that classifications which burden constitutionally protected interests be closely related to important or substantial governmental objectives. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969). Finally, the basic equal protection test requires that there be a rational relationship between the purpose of the state action and any classification created by the act.

Wealth has not generally been held to be a suspect criterion. For example, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973), the Court declined to "extend its most exacting scrutiny" to the review of a school-financing system that allegedly discriminated on the basis of wealth. See also, Maher v. Roe, 432 U.S. 461 (1977).

On several occasions the Court has invalidated state procedures which, on the basis of wealth, interfered with a criminal defendant's ability to obtain review of his conviction. For example, in Griffin v. Illinois, 351 U.S. 12 (1956), the Court held that Illinois could not refuse to provide to petitioners, without costs,

a trial transcript when one was necessary in order for them to obtain appellate review of their convictions. Said the Court, "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." Id., at 18 (Emphasis supplied). And, in Douglas v. California, 372 U.S. 353 (1963), the Court invalidated on equal protection grounds California's policy of failing to provide State-paid counsel to indigents for their rightful appeals.

Regardless of whether an enhanced level of scrutiny has been employed to review wealth-based discrimination in criminal trials and direct appeals, only the rationality test should be used to review probation decisions. Unlike the trial and direct appeal, probation is not a part of the crucial fact-finding process. Thus, decisions concerning whom to probate and whose probation to revoke should be evaluated only under the rationality test. Also, it appears that in Tate v. Short, 401 U.S. 395 (1971), and Williams v. Illinois, 399 U.S. 235 (1970), the state procedures employed to imprison indigent defendants were evaluated only under the rationality test.

B. APPLICATION OF THE RATIONALITY TEST IN THE INSTANT CASE.

In order to apply the rationality test, we must first consider the State interest involved in the revocation of petitioner's probation. Under Ga. Code Ann. § 27-2709(c)(Supp. 1981),

> If it appears to court [sic] upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

Administering probation in accordance with this statute is certainly a legitimate State interest.

Is the revocation of petitioner's probation for non-payment of his fine and restitution amounts rationally related to the State interest described above? This is the central issue presented in this case. Certainly financial ability is a legitimate and important consideration in the decision to probate. Financial means and gainful employment-- which is usually related to financial means--certainly affect the "likel[ihood of a defendant] to engage in a criminal course of conduct" which obviously involves the "ends of justice and the welfare of society." Ga. Code Ann. § 27-2709(c). If financial ability can be considered in making the decision to probate, clearly it can be considered in revocation. If a defendant's financial ability was misrepresented to the court or proved to be less than expected, it might be the case that probation is no longer appropriate under § 27-2709(c). Thus, revocation would be rational in view of the

State interest involved. As the Georgia Supreme Court has held:

> [I]f a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment. In such a case the judgment has already been made for the defendant -- if the fine cannot be paid, the defendant is not a good risk for probation and the sentence must be served.

Hunter v. Dean, 240 Ga. 214, 219 (1977).

Petitioner's probation was properly revoked. He, a convicted burglar with new burglary charges pending against him, was simply no longer a good probation risk when he lost his job and the ability to pay his modest fine and restitution amounts. Thus, it was rational for the trial court to issue the order of revocation.

The principles embodied in Williams v. Illinois, 399 U.S. 235 (1970), and Tate v. Short, 401 U.S. 395 (1971), do not cast doubt on the constitutionality of the revocation of petitioner's probation. In both cases the criminal defendants were punished beyond state statutory maximums solely because of their inability to pay fines. The question presented here was not reached. In Williams, supra, at 243, the Chief Justice wrote for the Court:

> We hold only that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine . . . . We have no occasion to reach the question whether a state is precluded from holding an indigent accountable for a fine by use of penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

The Court went on to say that the State cannot fail to enforce fines against indigents because to do so would be "inverse discrimination." Id., at 244. The Court then cited, with approval, statutes of

California, Michigan, and Pennsylvania -- all of which permitted imprisonment in the event of a defendant's failure to pay a fine as directed. Id., at 245 n. 21, 247, 251, 256.

There is disagreement between lower courts on the issue presented here. The Georgia Supreme Court has approved of probation revocation in similar situations. Hunter, supra; Calhoun v. Couch, 232 Ga. 467 (1974). The Fifth Circuit has disagreed. Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977), vacated, 439 U.S. 1041 (1978); United States v. Boswell, 605 F.2d 171 (5th Cir. 1979) (basis of decision unclear). And, at least one other federal court has held probation revocation in such circumstances to be a denial of equal protection. Hutchinson v. Jones, 477 F.Supp. 51, 53 (N.D. Ga. 1979) (specifically disagreeing with Hunter, supra). At some point this conflict should be resolved.

Finally, the effect of the Georgia First Offenders Act should be noted. Under that Act, had petitioner's probation not been revoked he would, had he kept the other conditions, been "completely exonerate[d] . . . of any criminal purpose . . . and . . . not . . . considered to have a criminal conviction." Ga. Code Ann. § 27-2728 (Supp. 1981). Hence, the State interest served by petitioner's revocation is especially strong.

CONCLUSION

Petitioner's probation was not revoked in violation of the Equal Protection Clause. Therefore, the Georgia Court of Appeals has not "decided a federal question in a way in conflict with applicable decisions of this Court." Moreover, no other "special and important reasons" militate in favor of review. S. Ct. Rules 17. Thus, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF FILING UNDER RULE 28

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on June 1, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

JOHN C. WALDEN

Sworn to and subscribed
before me this 1st day
of June, 1982.

Cheryl J. Mitchell
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires July 19, 1985